IN THE HIGH COURT OF JUDICATURE FOR RAJASTHAN
AT JODHPUR

J U D G M E N T

LAXMAN SINGH Vs. VISHNUGOPAL

S.B.CIVIL SECOND APPEAL No.164 of 2006

Date of judgment : 09 October,2006

PRESENT
HON'BLE SHRI N P GUPTA,J.

Mr. M.C.Bhoot, for the appellant.
Dr. Sachin Acharya, for the respondent.

BY THE COURT:

This second appeal has been filed by the defendant, against the decree for eviction, passed by both the learned courts below on the ground of material alteration, and reasonable and bonafide necessity of the plaintiff for his son, and also by deciding the aspect of comparative hardship, and partial eviction, against the appellant.

The facts of the case are that the plaintiff respondent filed a suit for eviction, alleging interalia, that the plot described in para-1 of the plaint, being situated near Alka Hotel, Alka Road, Udaipur, was let out

to the defendant at the monthly rent of Rs. 200/- on 1.9.1983. It was alleged that the tenancy was oral. However, thereafter Kabuliyat was executed. According to the plaintiff, his son Ashish is unemployed, and plaintiff is also going to retire shortly, therefore, the plaintiff requires the suit premises, reasonable and bonafide for himself and his son, for establishing a good hotel, as hotel industry is flourishing in Udaipur, and the suit plot is quite size-able. It is also alleged, that the plaintiff has submitted necessary plan to the Municipality, and has financial resources as well. It was alleged, that the defendant carries on a workshop of repairs, which is a small business, and can be carried out anywhere, while the plaintiff and his son would remain jobless. Thus, comparative hardship was pleaded in favour of the plaintiff. Then, it was further pleaded, that the defendant, without permission of the plaintiff, has started construction over the plot, and is doing material alteration thereon, with the result, that the demised property, instead of remaining a plot, would become a residential premises, and the good counseling advanced by the plaintiff and his son did not yield any result, rather the plaintiff and his son were manhandled and misbehaved. According to the plaintiff a notice determining tenancy was given on 17.3.93, but to no good. Then, giving details of material alteration, it was pleaded in para-8 of the plaint, that on the south eastern part of the plot, the

defendant expressed intention to erect a wall, to cover it, and construct a Pucca house, for which he has already erected a wall, and towards the east, walls have been erected, on the three sides and a small room has been erected. Then, towards the north, he has made wholes in the plaintiff's other shops, so as to rest iron angle, and thereon tin shed has been put. Then, the entrance gate has been moved forward, and the hood of the plaintiff's other shop, and other projections of all these shops, have been demolished, and the board, in the name of "Bharat Tractors" has been placed. To the plaintiff it appears, that the defendant wants to sublet the premises, and change the nature of his business, and is also likely to change the name of the firm, like Lucky Trackers or the like. Interalia with these allegations, the decree for eviction was prayed for, on the ground of reasonable and bonafide necessity, material alteration, and attempted subletting.

The defendant filed duly amended written statement on 26.2.1999. The case of the defendant is, that the premises was taken on rent for the first time in June, 1969 at a monthly rent of Rs. 121/-, in the name of Bharat Tractors & Machineries, for carrying on repairs, and sale of spare parts of tractors, and since then the defendant is in possession as tenant, and at that time itself it was mutually agreed, that for workshop a shed shall be constructed. Likewise, for office and storage of spare-

parts, and for display thereof, room shall be constructed, and accordingly the construction was raised at that time itself, and within the knowledge of the plaintiff. According to the defendant, at the time, when he took the premises on rent, the plot was on rent with Asgar Ali at a monthly rent of Rs. 100/-, and the defendant was inducted at a monthly rent of Rs. 121/-, on the condition of his pleasing Asgar Ali, and taking possession. Accordingly the defendant paid Rs. 3725/- to Asgar Ali, and took possession on 5.6.69, and thereafter the construction of tin shed and office were raised, and on 20.10.69, i.e. Dashahara the functioning of the workshop was inaugurated. It was pleaded that the plot was taken on rent for establishing a workshop, and other connected business, for which shed was constructed to protect the machinery and parts from vagaries of weather, which was in the knowledge of the plaintiff, since beginning. Then, in the alternative it was pleaded, that since beginning the construction is there but the plaintiff never raised any objection, rather rent was increased twice. Thus, it is not open to the plaintiff to claim eviction on that ground. In June, 1969 the rent was Rs. 121/-. Thereafter it was increased to Rs. 140/- in August, 1978, and then it was increased to Rs. 200/- since September, 1983. Thus, it is wrong to contend, that the plot was initially taken on rent in September, 1983. Concealing all these facts the plaintiff has taken stand mixing truth and falsehood, about having got executed fresh

rent note with increasing rent. Then, denying bonafide necessity, it was pleaded, that the plaintiff is on a lucrative post, and his son is carrying on property dealing business, and is thereby earning very good income. Thus, the plaintiff has no reasonable and bonafide necessity. It was pleaded, that of course Udaipur is a tourist place, but number of hotels, disproportionately exceeded, rather hotel industry is struggling hard for existence, apart from the fact that plaintiff or his son has not obtained any education in this regard, nor have any experience. Then, it was pleaded, that recently the plaintiff has sold many immovable properties, which he would not have sold, had he intended to set up the hotel business. That apart the plaintiff also has a big plot of land in his possession, which he is intending to sell off to Jain Samaj. That plot is of much bigger size, and is better located, being situated on the main high way, and not using that plot shows, that the alleged necessity is neither reasonable, nor bonafide. Denying comparative hardship it was pleaded, that the defendant's establishment is of course small, if compared to Tata and Birla Groups, otherwise it is reasonably big one, and has good market reputation, he is running the workshop there for the last 35 years, and has acquired good will, which will be lost on being evicted, and since the defendant has no other means of livelihood, he would be rendered without means. As against which, if the plaintiff at all wants, or wanted, to establish any

hotel, he could very well use the land available with him. It was denied that the defendant is changing the use of premises or is converting it into residential one. According to the defendant the allegations of intended constructions are vague, apart from the fact that the defendant has neither raised any new construction, nor does he propose to raise any new construction. The allegation of misbehavior and manhandling were also denied. It was then pleaded, that whatever construction has been raised, was raised at that time when the premises were taken, and for the purpose for which it was taken, and within the knowledge of the plaintiff, the construction raised is neither permanent, nor has it caused any damage to the property, nor resulted into any material alteration, and that he has not raised any new construction. It was pleaded that the plaintiff time and again wanted to raise rent to Rs. 1000/- per month, and since the defendant declined, the suit has been filed.

The plaintiff filed two rejoinders one on 23.12.1994, to the original written statement, and other on 23.4.1999, to the amended written statement. It was pleaded that the defendant had executed a rent note as Kabuliyat on 1.9.83, which was filed along with plaint, and which constitutes part of the pleading, and that by denying such document, the defendant loses right to defend. It was denied that it was ever agreed, that the defendant could

raise construction on workshop etc., rather from the Kabuliyat dt. 1.9.83, it is clear, that there was no such stipulation, and any stipulation contrary to written document cannot be considered. In the Kabuliyat it is clearly mentioned, that the plot was taken on rent. It was also pleaded, that on execution of the new agreement, all old agreement came to an end. The plaintiff never gave any permission to raise any construction, and that the defendant had taken the premises for a short term, as mechanic, to repair the vehicles, and shortly he would purchase a plot, and vacate, and now he is pressing the plaintiff to sale the plot in question at a throw away price. It was pleaded, that the plaintiff has already retired on 31.5.94, and that the son is not busy in property dealing business, rather for running hotel business the suit premises is required reasonable and bonafide, the defendant can very well shift his business to Transport Nagar, or such place where such businesses are carried on. It was denied that the plaintiff has in his possession any other plot, rather the front portion land is more suitable for business, and the plaintiff wants to establish hotel on the suit premises. It was also denied that the defendant has not raised any new construction, rather few days ago itself, the defendant had demolished the parapet, and installed a board of M/s. Bharat Tractors & Machineries, and thereafter of Lucky Tractors, and thereafter of Bharat Spares & Engine Services, and had

moved the entrance gate, and has done all this without the permission of the landlord. Then, in the rejoinder dt. 23.4.1999 it was pleaded, that when in Kabuliyat dt.1.9.83, there was no tin shed, or any other construction, it is not open to the defendant to contend, that he raised construction in the year 1969 itself, and production of accounts and receipts shows a wrong state of affairs, on the face of recitals in the written statement.

On these pleadings the learned trial court framed four issues. The first issue was regarding plaintiff's reasonable and bonafide necessity, second issue related to comparative hardship, while the third issue related to material alteration, by erecting tin shed, angles, and walls etc.

The learned trial court, deciding issue no. 1 found, that the plaintiff has established reasonable and bonafide necessity of the suit premises for himself and his son, for setting up hotel business. While coming to this conclusion it was considered, that the plaintiff has shown requirement for setting up hotel, and notice was given in March, 1993, which was replied by contending that the plaintiff's son is a property dealer. Thereafter the plaintiff has clearly alleged to be shortly retiring, and to be needing the premises, and having applied for premises to construct the hotel, and has taken steps for taking loan

as well. On the other hand, according to the defendant the suit has been filed with the intention to increase the rent as Rs. 1000/-, and the plaintiff has no reasonable and bonafide necessity. Then, it was found that from Ex. 8 it is clear that the letter was written by Municipality. Then, it was considered that from the entire evidence, it does not transpire, that the plaintiff's son is carrying on property dealing business, rather the defendant has deposed ignorance about various details, and has not deposed a word about the plaintiff's intention, in filing the suit to be, to enhance the rent to Rs. 1000/-. Likewise the alternative land shown, clearly appear to be of residential nature, and the plaintiff having retired, has no other occupation, and that the suit land is situated at the place where there are many hotels, and is aptly suited for hotel business.

Then, deciding issue no.2 it was found, that the plaintiffs are unemployed, while the defendant, even according to himself, has good financial condition, and the defendant has also admitted that good hotels can function on the suit premises, and the defendant's son Kedar Singh has admitted, that the land has been purchased by B.S.E.S. India Pvt. Ltd. of which the defendant, his son, and Ranjit Singh are directors, which land measures 23000 sq. ft., and that the suit land measures 3000 sq. ft. only, which is not suitable for partial eviction, as this much land is needed for hotel and parking. Thus, this issue was decided in

favour of the plaintiff.

Then, deciding issue no.3, it was considered, that from the evidence led on the side of both the parties, it is clear, that the defendant has materially altered the premises, and that when the defendant admits his signature on the rent note Ex.-1, the recognition and conditions contained in Ex.-1 do not comes to an end, and on the face of the rent note it has to be accepted that had the defendant raised construction with permission of the landlord, it would have been mentioned in the rent note of 1983. Thus, it is clear that the defendant is guilty of material alteration. Consequently, the suit was decreed.

In appeal, assailing the findings of the learned trial court on issue no.1, it was contended, that the plaintiff has 10000 sq. ft. of land adjoining his residence, which is more convenient, and could be used, and that has not been considered by the learned trial court. Likewise, he has sold other land to Rose Jute Trading & Co., in the year 1997. Thus, it cannot be said that the plaintiff has reasonable and bonafide necessity. The learned lower Appellate Court considered the evidence led on either side, and noticed, that the defendant has deposed ignorance about the details of property dealing transactions of the plaintiff's son, and the defendant, in cross-examination has admitted, that in the line of the

plot in question there are many hotels, and therefore, hotel can very well run on this land, and that it is established from evidence, that in the vicinity there are hotels named Alka, Ankur and Prince, apart from Tourist Bungalow, and that the plaintiff is the best judge of his requirement, and simply because he has sold certain land, it cannot be said that the plaintiff does not have reasonable and bonafide necessity. Then, the oblique motive pleaded by the defendant about the plaintiff's intention to enhance the rent, has been disbelieved on account of defendant having not deposed anything in this regard. Then, the defendant having acquired alternative land on 2.12.95 was considered, and thus the finding on issue no. 1 was upheld.

Then, regarding issue no.2 it was contended by the defendant, that the defendant has no other land or premises, apart from the fact, that even if the defendant has any other land, that consideration applies only in case of residential accommodation, and not the commercial ones. Learned lower Appellate Court considered the submissions, and found, that the defendant has admitted to be of sound financial condition, capable of purchasing big plot of land, and that it has been established on record, that vide Ex. 15 and 16, the defendant had purchased two very big plots of land. Thus, the finding of the learned trial court on issue no. 2 was affirmed.

Then, assailing the finding on issue no. 3, it was contended, that at the time of taking premises on rent in the year 1969, walls were there on three sides, and putting tin shed thereon does not amount to permanent construction, and that the plaintiff had permitted to place the tin shed. It was also contended, that at the time of taking on rent, walls of the toilet, and walls of the room for storage of spare parts, already existed, but walls of toilet have only been covered by putting stone slabs, and store room had been covered by asbestos sheet, while the workshop has been covered by putting tin shed on iron angles, which does not amount to material alteration, apart from the fact, that the plaintiff, thereafter, by receiving rent, has waived his right to complain against such construction. The learned lower Appellate Court considered the plaintiff's admission, that the plot was let out to Laxman Singh and Doongarwal in the year 1969, and since then the tractor repair work is going on, while according to the defendant he took the premises in the year 1969, and erected the shed, for which he talked to the plaintiff, and the plaintiff gave out, that the defendant may do anything as he likes, but then he will not bear the expenses, and would take the plot as it is being given. Then, in July he started construction work wherein the room for spare parts, one room for office, one latrine, one bathroom, and one shed for tractor repair was constructed. This construction

was completed in September, and the plaintiff did not raise any objection prior to filing of suit. After considering this evidence, it has been found, that the earlier rent note was in the name of Sri Chand, who was partner, but the rent note by the defendant is of 1.9.83, and the defendant is bound by the recitals of rent note Ex. 1, which clearly recites the property to be plot having no roof, and therefore, it has to be assumed, that the construction has been raised only after 1983, and since the construction as admitted by the defendant is of permanent nature, it does amount to material alteration, and since there is no reliable evidence to show, that this construction was raised with the plaintiff's permission, it does amount to material alteration. Thus, the finding of learned trial court, was affirmed.

Then, the finding on question of partial eviction, as recorded by the learned trial court was also affirmed. In the result the appeal was dismissed.

Assailing the impugned judgments and decrees it was contended, that the plaintiff had pleaded material alteration in para-8, while the defendant had clearly pleaded all this to have been done in 1969, and no objection was ever raised by the plaintiff, rather rent was enhanced twice. Then, in rejoinder nothing was said by the plaintiff on this specific stand of the defendant, about

construction having been raised in the year 1969, and nothing having been done from 1969 to 1983. This coupled with the fact, that the plaintiff admitted the defendant to be tenant since 1969, and therefore, the plaintiff is not entitled to decree for eviction on the ground of material alteration. Then, assailing the finding on the question of reasonable and bonafide necessity, it was contended, that the plaintiff applied for permission in the year 1989, and last correspondence in that regard is of 4.1.1990, then notice for eviction was given on 11.3.93, and the suit was filed on 15.7.93. Admittedly the permission for raising construction of hotel was rejected, and this delay between applying for permission, and filing suit, has not been explained by the plaintiff. In this regard reliance was placed on the judgment of Hon'ble the Supreme court in Indersen Vs. Rameshwar reported in (2005)9 SCC-225, specially para-10, where it has been considered, that the plaintiff retired in 1994, and he had purchased the property in 1999, while the suit was filed in 2001, and it was considered, that the delay is required to be considered, to test the bonafides, and is fatal to the plaintiff. It was also contended, that during pendency of the suit the plaintiff had sold various plots. Then, it was also contended, that the plaintiff has alternative land, if he at all wanted to establish a hotel, inasmuch as P.W.3 the son of the plaintiff had clearly admitted, that the land is available towards the west of his house, measuring

3000 sq. ft. which is equivalent to land in dispute. It is contended that this land being available, it is the duty of the plaintiff to explain unsuitability of that land, and taking that in view, the alleged need of the plaintiff is to be seen objectively. Reliance in this regard was placed on the judgment of Hon'ble the Supreme Court in Sri Balaji Krishna Hardware Stores Vs. Srinivasaiah reported in AIR 1998 S.C.-994 specially para-6. It is contended that learned courts below have upheld the need, because in view of the learned courts below, the landlord is the best judge of his requirement, while the legal position is otherwise inasmuch as in Allimuddin Vs. Chandrika Prasad & Ors., reported in 1996(1) RLW (Raj.)-289, there is one line observation, while in view of the judgment of Bench consisting of three Hon'ble Judges of Hon'ble the Supreme Court in M.M.Quasim Vs. Manohar Lal Sharma & Ors. reported in AIR 1981 SC-1113 para-18, when the tenant shows availability of other premises with the landlord, it is for the landlord to show the unsuitability thereof. Taking any other plea, amounts to betrayal of rent law. Reliance was also placed on the judgment of Hon'ble the Supreme Court in Gaya Prasad Vs. Pradeep Srivastava reported in 2001(2) SCC-604. Then, the learned counsel invited my attention to the application for amendment in the written statement, seeking to plead, that the bye-laws have been amended in 2000, and the consequence thereof is, that now on the land in question the plaintiff cannot be given permission to

construct any hotel, and it was contended, that the existence of the rule is not in dispute, by filing any reply, on the side of the respondent, and therefore, on the face of existence of legal bar, it cannot be said that the plaintiff is entitled to decree for eviction.

On the other hand, learned counsel for the respondent, supported the findings of the learned trial court. Supporting the finding on reasonable and bonafide necessity, learned counsel read to me the statements of P.W.1 and P.W.3, and contended that from this evidence the plaintiff's requirement is established, and that the tenant has purchased a very big chunk of land, and has also started business there. Then referring to the statement of P.W.1 it was contended, that Ex.-6 is the site plan of the plot, and even thereafter the plaintiff had regularly been going to the collector for permission. Thus, the delay is clearly explained, if there be any. Then, referring to the statement of P.W.3 it was contended, that it was clearly deposed, that near the suit premises, there are many hotels like Alka, Ankur and Tourist Bungalow etc. Then, regarding permission it was pointed out, that according to P.W.3, he did not get permission, but then, there is nothing to show, that permission was refused, and that the land in question measures 5000 sq. ft. Then, it was contended, that the finding on the question of reasonable and bonafide necessity, is a pure finding of fact, and is not vitiated

on any of the grounds available under Section 100 C.P.C. It was contended, that the application was moved to the Municipality for permission, and not granting permission does not mean, that it stands refused. Thus, the judgments cited do not come in the way of the plaintiff. It was maintained, that the defendant cannot dictate the terms. It was also contended, that there was no cross examination, directed to the plaintiff, on the aspect of suitability of the other land, for the purpose for which the eviction is sought. Reliance was placed on the judgment of Hon'ble the Supreme Court, in Sait Nagjee Purushotham & Co. Ltd. Vs. Vimalabai Prabhulal & Ors. reported in (2005) 8 SCC-252, to contend, that the landlord is the best judge of the requirement. Then reliance was also placed on the judgment of Hon'ble the Supreme Court, in P.S.Pareed Kaka & Ors. Vs. Shafee Ahmed Saheb reported in (2004) 5 SCC-241, to contend, that in deciding the question of bonafide necessity the balance of convenience is also to be seen. Then, reliance was placed on the judgment of Hon'ble the Supreme Court, in Shiv Sarup Gupta Vs. Dr.Mahesh Chand Gupta reported in (1999) 6 SCC-222, specially para 12, 13, and 14 to contend that the choice of the landlord is required to be respected, and all that is required to be seen is, that the requirement is not mere pretence. It was contended on the authority of this judgment that the plaintiff could have been asked as to how does the landlord not find the alternative land to be suitable, while in the

present case, admittedly there are hotels in the area in question, and the plaintiff was not asked a single question about suitability of the land, which admittedly is of residential area. Then, reliance was also placed on the judgment of Hon'ble the Supreme court, in Pratap Rai Tanwani & Anr. Vs. Uttam Chand & Anr. reported in (2004) 8 SCC-490. It was also contended, that the plot in question is in commercial area while the land admitted by P.W.3 is in residential area, and hotel construction cannot be raised thereon, rather no commercial activity can be undertaken in the residential area, and therefore, that land cannot be said to be alternative land available to the landlord. Thus the judgment of Hon'ble the Supreme court in M.M.Quasim's case is of no assistance. Then, referring to Order 7 of the Supreme Court Rules 1966, and referring to the judgment of Hon'ble the Supreme Court, in Javed Ahmed Abdul Hamid Pawala Vs. State of Maharashtra reported in (1985) 1 SCC-275 it was contended, that Hon'ble Judges sit in Division Bench in Supreme Court, as two Judges or three Judges, only for the sake of convenience, as directed by Hon'ble the Chief Justice, and therefore, the mere fact, that the judgment is by Bench comprises of two Hon'ble Judges or three Hon'ble Judges, makes no difference whatever. Then, it was submitted, that since the defendant has already acquired big suitable land, the question of comparative hardship has rightly been decided in favour of the landlord.

Then, supporting the finding on material alteration, it was contended that the construction were made upto 1993, and even thereafter upto 1994. Reliance was placed on rent note Ex.-1, specially para-4 and 5, containing recitals about the state of the property, and undertaking of the tenant, that he would not raise any construction. Then, reference was made to Ex.5, being reply to the notice dt. 6.5.93, wherein it was mentioned, that tin shed were existing in the beginning, and obviously the construction of office, bathroom, latrine and other room, and shifting of the gate was done thereafter. Then, after reading para-5 and 8 of the plaint and the written statement, it was contended, that the substance of the case has been pleaded by the plaintiff, and there is no variance in the pleading and the proof. Relying on the judgment of this Court in Lal Shanker & Anr. Vs. Chaturbhuj & Ors. reported in AIR 2000 Raj.-333, it was contended, that hyper technicalities cannot be insisted. Regarding construction and interpretation of pleading, reliance was placed on the judgment of Hon'ble the Supreme Court, in Ram Sarup Gupta Vs. Bishun Narain Inter College & Ors. reported in AIR 1987 SC-1242, and in Syed Dastagir Vs. T.R. Gopalakrishna Setty reported in (1999) 6 SCC-337, and it was contended, that the evidence of father and son, in this regard is contradictory, and admittedly the status of the plot has been changed, and thus the material alteration is

established. Then reliance was also placed on the judgments in, Bapulal & Anr. Vs. Ramesh Chandra reported in AIR 1995 Raj.-121, and Bhairab Chandra Nandan Vs. Ranadhir Chandra Dutta reported in (1988) 1 SCC-383, to contend, that when the parties had gone to trial with eyes open, some formal flaws here and there cannot be taken as a ground to assail the findings.

Replying the contention about bye-laws, it was contended, that the application is not supported by any affidavit, and on the face of Rule 136(1) of the High Court Rules, the application cannot be considered, apart from the fact, that this was not a ground taken before the learned lower Appellate Court, or even in the memo of appeal. It was also contended, that the bye-laws produced is only a model bye-law, and it is not stated, as to when it had been adopted. Then, the bar of construction, as alleged, is not a certainty, as it is only a bye-law, apart from the fact, that for deciding suit for eviction, reasonable and bonafide necessity is required to be seen, as on the date of the suit. It was also pointed out, that the bye-laws as shown are of the Urban Improvement Trust, which has no jurisdiction over the land in question, as the construction thereon is covered by the Municipality, and therefore, this bye-law is wholly irrelevant. It was also pointed out, that the rented area of land is of course 3000 sq. ft. but the total land available is 5000, which is obviously larger

than the land available, being in the west of the residential house of the plaintiff. Then, reference was made to Ex.7, the application filed for construction, where it was mentioned, that permission was sought for construction of restaurant, and living accommodation in commercial hotel area, and there is no bar against raising of such construction.

In rejoinder learned counsel for the appellant contended, that there is no plea of plaintiff intending to establish a restaurant.

I have considered the submissions, and have gone through the record, and have also gone through the various judgments cited at the Bar.

The two learned courts below have decreed the suit for eviction, as noticed above, on the ground of material alteration, so also on the ground of reasonable and bonafide necessity, by deciding the question of comparative hardship and partial eviction, against the tenant. I propose to first deal with the findings of the learned courts below on the question of reasonable and bonafide necessity. It may be observed here that the aspects of comparative hardship and partial eviction, were rightly not assailed, as admittedly the defendant has about ten times bigger land, having been purchased for the same purpose,

and in view of the admitted position, that the hotel cannot be constructed on any portion of the land in question.

On the face of it, and as the legal position is, that the findings of the two learned courts below on the question of reasonable and bonafide necessity, is a finding of fact, in that view of the matter, what is required to be seen is, as to whether the finding is vitiated on any of the grounds, as contended by the learned counsel for the appellant, within the four corners of the permissible scope of 100 CPC.

I may recapitulate that the findings have been assailed on the ground, firstly, that there is delay on the part of the plaintiff in filing the suit, after occurrence of the reasonable and bonafide necessity, and reliance is placed on the judgment of Hon'ble the Supreme Court, in Indrasen's case. Secondly, on the ground, that admittedly the plaintiff has another land available, towards the west of plaintiff's residential house. In that view of the matter, it was for the plaintiff to explain the unsuitability of the land, in order to maintain suit for eviction on the ground of bonafide necessity, and reliance is placed on Sri Balaji Krishna's case, then thirdly, the consideration taken into account by the learned Courts below, about the landlord being the best judge of his requirement, has been assailed on the basis of the judgment

in M.M.Quasim's case and Gaya Prasad's case, and lastly on the ground, that since bye-laws has been amended, and in view of the amended bye-laws, the plaintiff cannot be given permission to raise construction of the hotel on the land in question, therefore, the defendant has sought permission to have the written statement amended.

I first of all take up the judgment of Hon'ble the Supreme Court, in Indrasen's case. Of course in that case, in para-10 Hon'ble the Supreme Court considered, that the plaintiff had retired on 30.11.94, he purchased the suit property on 7.12.99, and issued notice on 1.2.2001, and filed petition for eviction on 24.5.2001, and his requirement was not found to be bonafide, but then, this is not the ratio of the judgment. What is significant to note is, that in that case the petition was filed under special provisions for eviction, contained in Section 23-A, and under the Scheme of that provision, which finds place in Chapter-III-A, Section 23-J, in the same chapter, defines landlord for the purpose of that Chapter, to mean, a retired servant of any government including a retired member of defense services or a retired servant of a company owned or controlled either by the central or state government or a widow of a divorced wife or physically handicapped person or a servant of any government including a member of the defense services, who, according to his service conditions, is not entitled to government

accommodation on his posting to a place where he owns a house or is entitled to such accommodation only on payment of a penal rent on his posting to such a place. Obviously, the Chapter was intended to be available for seeking eviction in case of an urgent pressing need, and in that background, deciding first question, as framed in para-5, it was found in para-9, that the plaintiff had failed to establish, that he is a retired government servant and does not fall within the meaning of landlord, given in Section 23-J of the Act, and thus it was found that the eviction petition is liable to be dismissed on that ground alone. Then in addition, the question of bonafide requirement was considered, and after cataloging the facts, it was noticed, that the entire discussion in the judgment of Rent Control Authority, on the question of bonafide requirement seemed to suggest, that the authority was not satisfied with the need of the landlord, regarding bonafides of the need, however in the concluding line the authority observed, that the applicant bonafide needs the suit shop for starting the business of books and stationary. Hon'ble the Supreme Court found this conclusion to be not fitting with the discussion or the reasoning contained in the judgment of the authority thus the bonafide necessity was negatived. In my view, in this judgment, Hon'ble the Supreme Court even did not purport to lay down, that in cases, where there is such a delay in filing petition for eviction, on the ground of reasonable and bonafide necessity, the claim should always

be negatived, as lacking bonafide, thus this judgment does not help the appellant at all. It is a different story, that the bonafides of the appellant were not sought to be assailed on this ground before any of the Courts below. Thus, in my view, the finding of the learned Courts below on the question of reasonable and bonafide necessity cannot be interfered with on the ground, that the suit has been filed after delay, as contended by the learned counsel for the appellant.

Now I come to the aspect of alleged availability of alternative land, and the obligation on the part of the plaintiff to explain the unsuitability thereof. In this regard, coming to the pleading, the plaintiff has pleaded in the plaint in para-3, about the land being suitable for setting up of a hotel, and the defendant has alleged, that the plaintiff is already holding a lucrative post, and his son is engaged in the business of property dealing, and that plaintiff does not have any reasonable bonafide necessity. It was then pleaded, that the plaintiff does not have requisite experience and training. Then it has also been pleaded, that the plaintiff has recently sold many immovable properties, which he could use for setting up hotel, if he at all intended to do so, and that the plaintiff has a big plot in his possession, which he is trying to sell to Jain Samaj, which plot is much better situated for the hotel, and is of much bigger size, and is

situated on the main highway. This is the only pleading about availability of alternative land. Then coming to the evidence, the plaintiff P.W.1 has clearly deposed, that his son Ashish is unemployed, and he wants to establish a hotel. In cross-examination, all that has been suggested to him is that though his residential house is constructed on 10,000 sq ft land, which has been deposed by the plaintiff to be belonging to his brothers. He has denied availability of hotel land towards the east thereof, and has deposed it to be belonging to his brother Shri Gopal, who has sold it. Then he was confronted with Ex.A/7, and plaintiff admitted that, and clarified, that the plot mentioned therein only measures 800 sq ft, and has deposed that the land of Handi Restaurant was sold by him way-back in the year 1973. Then he has not been suggested the availability of any other land, or any land being contemplated to be sold to Jain Samaj, or having been sold to Jain Samaj. Then P.W.2 elder son of the plaintiff has appeared, and he admitted that the total land on which his father's house is situated measures 10,000 sq ft, and that in that premises, in the east, there was one plot, which was sold to M/s.Rose Jute Trading & Co. Significantly this witness was not suggested anything about any big size land being available, and contemplated to be sold to Jain Samaj, or having been sold to Jain Samaj. Then comes P.W.3, he has clearly deposed, about the best suitability of this land for hotel business. He was suggested that in the west of the house there is some land

available which may be around 3000 sq ft, which he admitted, and further deposed that the land let out to the appellant is also around 3000 sq ft, but the total premises is around 5000 sq ft. Again this witness was also not suggested about availability of any other land, as pleaded in the written statement, or any land being under contemplation to be sold, or having been sold to Jain Samaj, as pleaded in the written statement. Much was stressed by the learned counsel for the appellant, about the availability of the land in the west of the house, as admitted by P.W.3, and it was contended, that in view of the judgment of Hon'ble the Supreme Court, in Sri Balaji Krishna's case, it was for the plaintiff to explain unsuitability of that land. A look at the judgment in Sri Balaji Krishna's case shows, that in that case, the petition was filed for eviction from non-residential premises, on the ground of plaintiff's requirement for both his sons. During pendency of the proceedings, one of the son retired from the partnership, and it was contended by the tenant, that several other tenanted portions, occupied by other tenants for business purposes fell vacant during pendency of the proceedings, and the landlord was not acting, bonafide in not using the same for the business of his son Madangopal. Then it was noticed, that the High Court held, that P.W.1 and 2 had explained the difficulty arising from the other premises falling vacant, by saying that those portions which fell vacant had been given, and

were occupied by the daughters-in-law and other sons, because of the non-suitability of the premises for the son's business. It was also held by High Court that it was not that those shops which so fell vacant were not suitable for the purpose of Madangopal's business in glass and plywood. In that background it was held by Hon'ble the Supreme Court, that the question is, assuming the landlord's requirement was bonafide, whether the landlord was justified in not giving the above shop to his son Madangopal, and giving it to his daughters-in-law and other sons, and it was noticed that it is not stated that the daughters-in-law are having business and require a shop, or that their need was greater than that of Madangopal, and it has not been explained as to why the shop immediately behind the appellant's shop, which could be reached from the front side, through the passage between the appellant's shop, on the right, and Sriniwas Glass Agencies on the left, was not suitable. Hon'ble the Supreme Court held, that the conclusions of the learned Courts below were not sustainable. In my view, the judgment in the case of Sri Balaji Krishna, is a case of telling facts, and it is not laid down as an absolute proposition, that it would always necessary for the plaintiff, to positively assert and explain, the unsuitability of any other land which might be shown by the tenant to be existing anywhere. In Sri Balaji Krishna's case, as noticed above, the identical commercial premises had fallen vacant, and they were just behind the

suit premises, and were suitable, and the landlord's explanation was, about having given away those shops to his daughters-in-law, who were not found to be carrying on any business, or even requiring. In that view of the matter, this judgment cannot be held to be laying down as a rule of thumb, that the burden is on the plaintiff to explain, in the manner, as sought to be contended by the learned counsel for the appellant. Then considering the facts of the present case from a reasonable stand point, it is writ large, that even according to the statement of P.W.3, about the land being situated in the west of the residential premises, he has clearly deposed the suitability of the land in question, for setting up hotel, not a word has been suggested to this witness, about suitability of this residential land for setting up hotel. Apart from that, that land is smaller, as compared to the land that would be available on eviction of the appellant, as here the land is 5000 sq ft. This is one aspect, while considering the case from the stand point of plaintiff's evidence. Coming to the defendant's evidence, it has been deposed by the defendant that the plaintiff's house existed on around 10,000 sq ft land, and in the east thereof the plaintiff's land is there. Significantly even the defendant has not said anything about availability of the land in the west, much less about its suitability for setting up of hotel. Then availability of other land as pleaded in the written-statement has not been deposed at all. In cross examination

he has admitted existence of many hotels in line of the land in question, and there is no other evidence on the side of the defendant, about availability of any other land with the plaintiff, whereon he may establish his hotel. Thus, this contention of the learned counsel for the appellant also does not hold good. So far the plaintiff having sold other land is concerned, the land sold is shown to be of only 800 sq ft, which is wholly irrelevant.

In view of the above, since the plaintiff's requirement is established as a fact, and its reasonableness and bonafides are also not successfully assailable on the grounds, on which it has been assailed, and since it has been found, that defendant has failed to establish availability of any other suitable land, to the plaintiff, I need not detain myself on the aspect of the proposition, of the landlord being the best judge of his requirement and premises.

I now take the contention based on the application for amendment. A look at the application shows, that thereby the plaintiff has alleged in para-2 of the application, that during the pendency of the matter the State Government framed model by-laws for buildings in the urban areas, and the Urban Improvement Trust, Udaipur framed the bye-laws, under which the required minimum area for construction of hotel is 500 sq mtrs. As such, legally

no permission can be given for construction of hotel on the disputed plot. With this pleading, in para-3 the applicant has prayed to incorporate the amendment in the written-statement to contend, that the land is much lesser than 500.89 sq mtrs, therefore, the plaintiff cannot raise construction on the disputed land, nor the UIT, Udaipur or Municipal Council, Udaipur can give permission for construction, and therefore, it cannot be said that the plaintiff reasonably and bonafide requires the suit land.

Admittedly the application is not supported by any affidavit, as required by Rule 136. Significantly the model bye-law or the bye-laws as may have been adopted by the UIT has not been produced on record, despite being repeatedly asked, nor even the Gazette notification has been produced, nor even the particulars of Gazette. All that has been submitted is, that such bye-laws had been framed by the State Government, and therefore, identical provisions must have been adopted by the UIT, Udaipur, and it has been asserted, that it has been so adopted, while requirement of the law is, that such adoption should be published in the official Gazette, but no such Gazette has been produced. The other aspect of the matter is, that as the part of bye-law was read to me, it was related to UIT, according to the scheme of the Urban Improvements Act 1959, the UIT retains its control and powers over a part or category of land, for a particular time or purpose, and

thereafter the control goes to the Municipality. In the present case the plaintiff had applied for permission to the Municipality, and it is nowhere the case of the defendant, that the permission was required to be obtained from UIT, or that the UIT had any control, and it is not shown that any such by-laws has been framed by the Municipality also. In that view of the matter, I do not find any force in the application, and therefore, the same is dismissed. Consequently, on this ground also, the impugned decree cannot be interfered with.

Thus, the net result is, that the finding of the learned courts below, on the question of reasonable and bonafide necessity, do not require any interference in my second appellate jurisdiction.

Since the impugned decree proceeds on two points, as noticed above, being reasonable and bonafide necessity, as well comparative hardship, and material alteration, and since as found above, that no interference is required to be made in my second appellate jurisdiction, in the finding of the learned Courts below on the question of the reasonable and bonafide necessity, so also on the aspect of comparative hardship and partial eviction, the decree for eviction can be sustained, even on these grounds alone, and therefore, irrespective of the fact, as to whether the grounds of material alteration holds good or not, that

would not affect the merit of the result of the appeal, therefore, any exercise on my part, on the aspect of material alteration, would be merely academic, as the appeal is at the stage of admission only.

Thus, the net result is, that I do not find any force in the appeal, as it does not involve any substantial question of law, and the same is dismissed summarily.

(N P GUPTA),J.

/Sushil/